

IN THE MATTER OF THE ARBITRATION BETWEEN

United Steelworkers, AFL-CIO, CLC,
on behalf of Local Union No. 9359,

Grievant,

and

OPINION AND AWARD

Pierz Villa, Inc.

Employer.

Grievance of USW, Local 9359

FMCS Case No. 05-58389

ARBITRATOR:

Janice K. Frankman, Attorney at Law

DATE OF AWARD:

January 12, 2006

HEARING SITE:

Americinn
306 LeMieur Street
Little Falls MN

HEARING DATE:

November 29, 2005

RECORD CLOSED:

December 19, 2005

REPRESENTING THE UNION:

Tara Widner, USW Staff Representative
District 11 Office
2829 University Avenue, SE Suite 100
Minneapolis MN 55414

REPRESENTING THE EMPLOYER:

Paula Rocheleau, Administrator
Pierz Villa, Inc.
119 Faust Street SE
Pierz MN 56364

JURISDICTION

The hearing in this matter was held on November 29, 2005. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of the Federal Mediation and Conciliation Service. The parties submitted a contract issue to arbitration. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted Post-Hearing Briefs posted on December 16, 2005, which were received on December 19, 2005, when the record closed and the matter was taken under advisement.

ISSUE

Whether the Employer violated the parties' Collective Bargaining Agreement when it permitted a non-bargaining unit worker to perform bargaining unit work which had been performed by a bargaining unit member who had been laid off and, if so, what is the appropriate remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

Denise Young was hired by Pierz Villa ("employer" "nursing home") in the summer of 2004 as a regular part-time employee in the Maintenance Department. She worked two shifts every pay period until March, 2005, when she was laid off following budget cuts at the nursing home. She currently works one shift for every two that the one full-time Maintenance employee or the Department Supervisor is unable to work. She also continues to work part-time in the Housekeeping Department and is on-call in the Laundry Department.

Pierz Villa, a skilled care facility, is located in Pierz, Minnesota, a community of 1200 people. At the time of this hearing, the bed count was 63, and a State Department process was pending to consider reducing the number of certified beds to 68 from 76. In March, 2005, budget cuts were made because of reduced bed count. Although the work of the Maintenance Department is not changed by reduced bed count, Ms. Young was laid off because she is the least senior employee in the Department and budgeted hours were cut. The bargaining unit includes full-time and regular part-time service and maintenance employees in several departments and positions within the departments. Ms. Young was the only bargaining unit employee laid off.

Pierz Villa is one of four corporations owned by two couples. The other three corporations include Elder Care of Minnesota, a Management Company which manages Pierz Villa, Inc., Elder Care of Bemidji and Heritage Corporation. When one facility has cash-flow problems, one of the other corporations has provided needed funds. Employees are also shared among the various corporations. For example, both Ms. Rocheleau, Pierz Administrator and Mr. Wroolie, Environmental Services Director have provided services at other facilities owned by the corporations. They are supervisors and not union members.

Pierz Villa has participated in the Rural Minnesota Community Employment Program ("Rural MN CEP", "CEP") for 25 years. CEP provides employment experience for youth and adults. Beginning at age 14, individuals may apply to be employed by CEP which places those who successfully interview with various businesses including Pierz Villa. At the time of the hearing, several CEP workers were working at Pierz Villa.

In the Spring of 2005, Jerome Kapsner, one of the owners of the several corporations encouraged Bob Gruber, a 15 year old high school student, to apply for employment with CEP. Bob Gruber was a CEP volunteer at the nursing home and had also performed some work for Mr. Kapsner on his farm. The Gruber and Kapsner families are neighbors. Bob Gruber interviewed at Pierz Villa and was hired by CEP and placed at the nursing home working in the Maintenance Department. CEP notes in May, 2005, identify Mr. Wroolie as his supervisor. Bob Gruber worked 265 hours from June 2 through August 19, 2005. The tasks he performed at the direction of Union employee Richard Schomer and Supervisor Dustin Wroolie included work which Ms. Young had performed before she was laid off.

The record does not include complete pay records for the period when Mr. Gruber was working at the nursing home. It appears that Ms. Young worked day shifts in Maintenance on June 20 and 21, when Mr. Wroolie did not work. In addition to Maintenance, Mr. Wroolie is Supervisor of Laundry and Housekeeping. He routinely performs tasks performed by the employees he supervises.

The Union has not complained in the past when CEP volunteers have performed tasks also performed by bargaining unit members, and Pierz Villa continues to provide work experience for CEP volunteers in other Departments. The Home is never responsible for paying CEP workers, some of whom are not eligible for paid employment and others, such as Mr. Gruber, who are. The Home does not have authority to fire CEP workers.

When the Union became aware that Mr. Gruber had been hired by CEP and placed at Pierz Villa in the Maintenance Department, it filed this Grievance citing violation of "Article I and all others that may apply" in the parties' CBA. The Grievance was denied on July 23. Paula Rocheleau, Administrator, wrote as follows:

At this time the Pierz Villa is unable to meet the request noted on the Grievance Report (grievance No. 10) for settlement from USWA. The hours designated in each department, for the Pierz Villa paid employees, are directly related to the facility census and budget. At this time the maintenance department is budgeted for 40 hours per week plus benefits with a census of 63 to 68 residents. We are currently at a census of 65. If the census increases or decreases consistently above or below these numbers the budgeted hours will be adjusted accordingly. There is no correlation to the Youth CEP Program and these hours. It is very important to the management of the Pierz Villa to be fair to our residents

and staff. It is equally important to be a sound asset to the community and its members. All three components make us an important part of the Pierz community. Joint Exhibit 3.

Peggy May, Staff Representative for USW, District 11 responded on August 2, in part, as follows:

An easy resolution to the grievance would be not to use any CEP workers at the Pierz Villa while there are other workers on lay-off status. If the census increases and the laid-off workers are called back to work, the CEP workers could then be an asset to the Pierz Villa. Joint Exhibit 4.

POSITION OF THE UNION

The Union argues that the provisions of the Recognition and Seniority Articles of the parties' CBA support its argument that the Employer has violated the Contract when it provided work experience to a CEP worker in the job position from which the Grievant has been laid off. It asserts that the Employer cannot replace bargaining unit work with a non-bargaining unit member under these circumstances. It agrees that the Home benefits from the work performed by CEP workers and that it has not complained in the past because previous and other current CEP work did not and does not replace the work of a laid off bargaining unit member. The Union does not object to work which supplements bargaining unit work. The Union seeks an Award sustaining the Grievance and making the Grievant whole for work and benefits which she would have received if the work had not been performed by the CEP worker.

POSITION OF THE EMPLOYER

The Employer argues that it has not violated the parties' collective bargaining agreement. It asserts that the Management Rights provisions of the CBA at Article 3 support its action in this case. It points to the fact that it has not paid Mr. Gruber, does not have the right to discipline him and to the need, under its agreement with CEP, to provide close supervision of his work. The Employer argues that the reduced bed count resulting in budget reductions supported its lay-off of the Grievant and that the hours worked by the CEP worker "were addition to the department, not a replacement." It argues that it has provided work to the Grievant as it can. It asserts that the Union has not complained in the past to the significant work performed by CEP workers under a program which benefits residents of the facility as well as the community. The Employer seeks an Award denying the Grievance.¹

¹ It is noted that the Closing Brief submitted by the Employer contains statements and information which constitute new evidence not presented at the arbitration hearing. Any such statement or information has not been considered by the Arbitrator and is not recognized in this Award. Submission of new evidence is not permitted in a Closing Brief since the opposing party has not had an opportunity to review and respond to it.

OPINION AND FINDINGS

It is appropriate to sustain this Grievance. The facts of this case together with interpretation of the Recognition, Seniority and Management Rights Articles of the CBA support this Award. It is unrefuted that the work provided by Bob Gruber in the summer of 2005, was bargaining unit work which had been performed by the Grievant prior to her lay-off. There also is no dispute that the Employer may lay off employees, direct employee activities including staffing and scheduling work and determine the number of hours to be worked as noted in its representative's Closing Brief in this case. It cannot, however, retain a non-bargaining unit worker to perform the work of a bargaining unit member whom it has laid off. To do so is to violate the terms of the CBA contrary to Article 3 which provides, "In the exercise of management rights, the Employer shall not violate the specific provisions of this Agreement."

Recognition clauses have historically been recognized to prohibit non-bargaining unit members from performing bargaining unit work. The terms and conditions of bargaining unit work, detailed in the succeeding Articles of the Contract, flow from establishment of the bargaining unit. Job security has long been recognized as one of the basic purposes for collective bargaining agreements. It is appropriate, nonetheless, to consider the specific facts of each case where these issues are raised. There may be a case where replacement of bargaining unit work is justified.

In this case, the Employer believes the fact that it did not directly employ Mr. Gruber justifies its action. It apparently distinguishes the work it provided him because it did not pay him. It highlights budget cuts and supports its case with the argument that since there was no budget for the work he performed, it cannot be held to have violated the Contract provisions. Taken to its logical conclusion, the Employer apparently would argue that it simply can cut its budget and thereby permanently eliminate bargaining unit work. To permit such a result would be to eviscerate the Collective Bargaining Agreement. In this case, the lay-off provisions would become meaningless.

The Arbitrator agrees with the Employer that it has broad latitude to direct the work of its employees. It cannot, however, essentially recruit a worker from a community agency, Rural Minnesota CEP, Inc. in this case, to perform the work of a worker it has laid off. The Maintenance Department Supervisor and one of the owners of Pierz Villa were apparently instrumental in CEP's hiring of Mr. Gruber. The fact that CEP paid him, and not Pierz Villa, does not justify the loss of work to Ms. Young. Pierz Villa cannot seek out and benefit from the opportunity it had to have needed work performed at her expense. To be clear, the result would be the same if CEP had initiated the contact. The fact that the Employer was proactive in securing Mr. Gruber's work simply underscores its need for help and blatant disregard for its responsibilities under the CBA.

Finally, the Employer urges recognition of its contribution to its community by providing work opportunities to CEP workers. According to Union Exhibit 4, Mr. Gruber worked 265 hours from June 2 through August 19. Had Ms. Young been returned from

lay-off during that time period, she would have been entitled to only a portion of those hours since she was hired to work two shifts per two week pay period in the Maintenance Department. It appears that the Employer could have provided and benefited from the CEP work opportunity without violating the Contract.

AWARD

The grievance is SUSTAINED. The Employer shall cease and desist from permitting individuals not members of the bargaining unit from performing bargaining unit work in the manner in which it has been provided in this case and consistent with this Opinion and Award.

The Grievant shall be made whole for all loss of pay and benefits for the period June 2, through August 19, 2005, when work was provided to a non-bargaining unit worker and she remained on lay-off status.

The Arbitrator shall retain jurisdiction of this matter for 60 days from the date of this Award to assist in its implementation where necessary and in an appropriate manner.

Dated: January 12, 2006

Janice K. Frankman, Attorney at Law
Arbitrator